



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/531,821	03/21/2000	Eli Levy	MERCURY.054A	7283

20995 7590 07/02/2003

KNOBBE MARTENS OLSON & BEAR LLP  
2040 MAIN STREET  
FOURTEENTH FLOOR  
IRVINE, CA 92614

EXAMINER

NGUYEN, QUANG N

ART UNIT	PAPER NUMBER
----------	--------------

2141

DATE MAILED: 07/02/2003

14

Please find below and/or attached an Office communication concerning this application or proceeding.

84



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents  
United States Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450  
[www.uspto.gov](http://www.uspto.gov)

**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Paper No. 14

Application Number: 09/531,821  
Filing Date: March 21, 2000  
Appellant(s): LEVY, ELI

**MAILED**  
JUL 02 2003  
Technology Center 2100

Ronald J. Schoenbaum

For Appellant

### **EXAMINER'S ANSWER**

This is in response to the appeal brief filed 04/22/2003.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences, which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1, 7-20, 22-23, 26-30 and 32-40.

Claims 2-6, 21, 24-25 and 31 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Invention**

The summary of invention contained in the brief is correct.

**(6) Issues**

The appellant's statement of the issues in the brief is correct.

**(7) Grouping of Claims**

Appellant's brief includes a statement that claims of the following groups of claims should not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

Group I: Claims 37-40.

Group II: Claims 12-20, and 22.

Group III: Claims 30 and 32-36.

Group IV: 1, 7-11, 23 and 26-29.

**(8) Claims Appealed**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Prior Art of Record**

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

<b>5,812,780</b>	<b>CHEN ET AL.</b>	<b>09-1998</b>
<b>6,157,618</b>	<b>BOSS ET AL.</b>	<b>12-2000</b>

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 1, 7-20, 22-23, 26-30 and 32-40 are presented for examination.
2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. **Claims 1, 7-20, 22-23, 26-30 and 32-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Boss et al. (US 6,157,618), herein after referred as Boss, in view of Chen et al. (US 5,812,780), herein after referred as Chen.**

Art Unit: 2141

4. As to claim 1, Boss teaches a system (system 400 of Fig. 4) that monitors the performance of Internet connections comprising:

the first computer as "UserMon" server 401 of Fig. 4 (i.e., the monitoring location) transmits a information/request (i.e., the first request message) to access a particular target site, (i.e., the target bookstore server system) over a first local dial-up connection (i.e., the first communication link) to a second computer (i.e., the first network access location) that is remote from the monitoring location for transmission on the network at the first network access location, to thereby simulate access to the server system (the target bookstore server) by a user who is local to the first network access location (Boss, C18: L62-65);

the first computer as "UserMon" server 401 of Fig. 4 (i.e., the monitoring location) transmits another information/request (i.e., the second request message) to access a particular target site, (i.e., the target bookstore server system) over a second local dial-up connection (i.e., the second communication link) to a third computer (i.e., the second network access location) that is remote from the monitoring location for transmission on the network at the second network access location, to thereby simulate access to the server system (the target bookstore server) by a user who is local to the second network access location (Boss, C19: L5-8).

whereby user access to the server system as experienced by users local to the first and second network access locations is monitored without the need for monitoring components local to the first and second network access locations (Boss, C4: L10-20).

However, Boss does not explicitly teach that at a monitoring location, generating first and second request messages that represent requests from users of the server system and monitoring responses received from the server system to the first and second request messages.

In the related art, Chen teaches a method and system for assessing the performance of a server application comprising:

at a monitoring location (LoadSim Client 26 of Fig. 2), generating first and second request messages that represent requests from users (200 simulated users) of the server system (Chen, C8: L29-36 and C17: L8-26);

at the monitoring location, monitoring responses received from the server system to the first and second request messages (Chen, C14: L23-31 and C17: L39-43).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to combine the teachings of Boss and Chen to have included the steps of at a monitoring location, generating first and second request messages that represent requests from users of the server system and monitoring responses received from the server system to the first and second request messages because it would allow the system to simulate users/clients making separate Internet connections to the server from all over the distributed communications network in order to obtain server performance values, which can then be used to determine what a user's experience accessing a target web site would be for users accessing the target web site from various geographic locations (Boss, C4: L10-17) (i.e., by determining the response times, the max number of clients that a given server can adequately support,

Art Unit: 2141

to diagnose Internet-connection problems) with a simulated client load and minimal hardware requirements (Chen, Abstract, C3: L53-59).

5. As to claim 7, Boss-Chen teaches the method as in claim 1, wherein the first and second communications links are connection-oriented links (first and second local dial-up connections) that directly interconnect the data center (UserMon) with the first and second network access locations (second and third computers, i.e., data-gathering clients at various remote locations), respectively (Boss, C18: L60-65 and C19: L5-8).

6. As to claim 8, Boss-Chen teaches the method as in claim 7, wherein the first and second communications links are Asynchronous Transfer Mode (ATM over fiber optic connections) links (Boss, C18: L46-50).

7. As to claim 9, Boss-Chen teaches the method as in claim 8, wherein the network is the Internet (Boss, C18: L24-35).

8. As to claims 10-11, Boss-Chen teaches the method as in claim 1, wherein transferring the first request message over the first communications link to a router or a modem that is directly connected to the network (Boss, C18: L16-35).

9. Claim 12 is a corresponding system claim of claim 1; therefore, it is rejected under the same rationale.



10. As to claims 13-16, Boss-Chen teaches the system as in claim 12, wherein each communication link is a dedicated, connection-oriented communication link and at least some of the plurality of communication links, which produce a round-trip latency that is predicable based on a current load on the communications link, are Asynchronous Transfer Mode links and directly peered to the Internet (Boss, C18: L46-58).

11. As to claim 17, Boss-Chen teaches the system as in claim 12, wherein the plurality of agent computers are arranged into groups, wherein each group is assigned to a respective communications link and corresponding user location (Chen, Fig. 4 and corresponding text, C9: L19-25).

12. As to claim 18, Boss-Chen teaches the system as in claim 17, wherein the agent computers within a group are configured to use unique IP (Internet Protocol) addresses associated with a corresponding remote Internet point of presence (Boss, C18: L51-54).

13. As to claims 19-20, Boss-Chen teaches the system as in claim 17, wherein at least one of the groups comprises multiple agent computers that are grouped through a hub and a single port of a local switch and the switch is connected to a router that is directly connected to the plurality of communications links (Boss, C18: L15-43).

Art Unit: 2141

14. As to claim 22, Boss-Chen teaches the system as in claim 12, further comprising a database that locally stores server performance data generated by the plurality of agent computers (Boss, C17: L41-63; Chen, C15: L35-40, L58-64 and C16: L51-55).

15. Claim 23 is a corresponding method claim of claim 1; therefore, it is rejected under the same rationale.

16. Claims 26-27 are corresponding method claims of claims 7-9; therefore, they are rejected under the same rationale.

17. As to claim 28, Boss-Chen teaches the method as in claim 23, wherein the server system comprises a web server of a publicly accessible web site (a bookstore web site) (Boss, C1: L29-37 and C15: L34-43).

18. As to claim 29, Boss-Chen teaches the method as in claim 23, further comprising recording the response time, and response times measured for other user locations, within a database that local to the first location (Boss, C17: L41-63; Chen, C15: L35-40, L58-64 and C16: L51-55).

19. Claims 30, 32-36 are corresponding system claims of claims 12-14, 16, 18-19 and 22; therefore, they are rejected under the same rationale.

Art Unit: 2141

20. As to claim 37, Boss-Chen teaches a system for monitoring a web site from multiple geographic locations, comprising:

a data center comprising at least one computer system (the UserMon Server 401 in Fig. 4 of Boss and the LoadSim 26 in Fig. 2 of Chen) programmed to access and monitor the web site (the bookstore web site); and

a plurality of Internet connection points (data-gathering client computers), each of which is located at a different respective one of said multiple geographic locations, at least some of the Internet connection points being geographically remote from others (e.g., the first and second clients 402 and 405 maybe separated from one another by a large distance such as greater than 500 miles) and from the data center (Boss, C4: L21-29);

wherein the data center sends request messages to the web site, and receives response messages from the web site, through the plurality of Internet connection points to monitor the web site as seen by users in each of the multiple geographic locations (Boss, C4: L10-17).

21. As to claim 38, Boss-Chen teaches the system as in claim 37, wherein the data center is connected to the plurality of Internet connection points by dedicated communication links (Boss, C18: L44-50).

22. As to claim 39, Boss-Chen teaches the system as in claim 37, wherein the data center monitors the web site as seen by users in the multiple geographic locations

Art Unit: 2141

without the user of any monitoring components in any of the multiple geographic locations (Boss, C4: L10-17).

23. As to claim 40, Boss-Chen teaches the system as in claim 37, wherein the UserMon server analyzes the performance values forwarded/sent from the data-gathering clients to determine what users' experience accessing the target web site from various geographic locations (i.e., the data center calculates response times of the web site as seen from each of the Internet connection points) (Boss, C4: L10-17).

**(11) Response to Arguments**

In the remarks, applicant argued in substance that

(A) The Examiner did not provide a separate analysis of Claim 37.

As to point (A), Examiner provides the analysis of Claim 37 as in paragraph 20 above.

(B) Prior Arts do not disclose or suggest "a system that monitors the performance of a server system as seen from multiple user locations without the need for performance monitoring components local to said user locations".

As to point (B), before addressing the argument, Examiner submits that the language of the limitation cited in the quotation can be given broad and reasonable interpreted in light of specification as the measured performance monitoring is performed remotely from multiple user locations, i.e., the measured performance monitoring can be done in the (target) server system itself or in any computers remote from the multiple user locations. Boss teaches a method that employs a system of geographically distributed data-gathering client computers (i.e., multiple user locations) that connect to the Internet, access a particular target site (i.e., a server system), and obtain performance-parameter values indicative of the quality of their respective connections to the target site. The performance-parameter values obtained are therefore indicative of the experience of a typical user accessing the target site. Each data-gathering client computer, having obtained the performance-parameter values associated with its respective connection to the target site, forwards the performance-parameter values to a central server (the "UserMon" server) for analysis (i.e., the "UserMon" server analyzes the received performance-parameter values without the need for performance monitoring components local to said user locations) (Boss, C2: L25-44).

(C) Prior Arts do not disclose or suggest "a dedicated communications link that connects the agent computer to an Internet point of presence that is geographically remote from the agent computer."

As to point (C), Applicant does not explicitly define the term “dedicated communications link” but only merely refers to Asynchronous Transfer Mode (ATM) and CLEAR Line links, which may be leased from a telecommunications company. Boss teaches the computers need not connect to the Internet via dial-up connections. The computers may, for example, connect to the Internet via cable TV connections, fiber optic connections, and wireless satellite connections. Boss also teaches that it will be appreciated that the network connections shown are exemplary and other means (i.e., which may include private or leased dedicated lines/links) of establishing a communication link between computers maybe used (Boss, C18: L40-50).

(D) Prior Arts do not disclose or suggest, “a mechanism for measuring server performance as seen from a particular geographic location without the need to run special monitoring software in that geographic location”.

As to point (D), Chen’s system measures the server performance (response times) as seen from a single location (the LoadSim client 26 of Fig. 2). Boss’ system analyzes (measures) the server performance as seen from a single location (the “UserMon” server 401 of Fig. 4) using the performance values forwarded/pushed from data-gathering client computers (Boss, C2: L25-44 and C4: L10-17).

(E) The Examiner has not identified a valid suggestion for combining the applied references, and no such suggestion exists in the references.

As to point (E), it would have been obvious to one having ordinary skill in the art at the time the invention was made to combine the teachings of **Boss** and **Chen** so as to obtain the claimed invention because it would allow the system to simulate users/clients making separate Internet connections to the server from all over the distributed communications network in order to obtain server performance values, which can then be used to determine what a user's experience accessing a target web site would be for users accessing the target web site from various geographic locations (Boss, C4: L10-17) (i.e., by determining the response times, the max number of clients that a given server can adequately support, to diagnose Internet-connection problems) with a simulated client load and minimal hardware requirements (Chen, Abstract and C3: L53-59).

Examiner believes that the motivation was given above to combine **Boss** and **Chen** is sufficient. In addition, Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Art Unit: 2141

Examiner has considered all of applicant's arguments.

The ultimate determination of patentability must be based on consideration of the entire record, by a preponderance of evidence, with due consideration to the persuasiveness of any arguments and any secondary evidence. In *re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). The submission of objective evidence of patentability does not mandate a conclusion of patentability in and of itself. In *re Chupp*, 816 F.2d 643, 2 USPQ2d 1437 (Fed. Cir. 1987). Facts established by rebuttal evidence must be evaluated along with the facts on which the conclusion of a prima facie case was reached, not against the conclusion itself. In *re Eli Lilly*, 902 F.2d 943, 14 USPQ2d 1741 (Fed. Cir. 1990). In other words, each piece of rebuttal evidence should not be evaluated for its ability to knockdown the prima facie case. All of the competent rebuttal evidence taken as a whole should be weighed against the evidence supporting the prima facie case. In *re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). Although the record may establish evidence of secondary considerations which are indicia of nonobviousness, the record may also establish such a strong case of obviousness that the objective evidence of nonobviousness is not sufficient to outweigh the evidence of obviousness. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 769, 9 USPQ2d 1417, 1427 (Fed. Cir. 1988), cert. denied, 493 U.S. 814 (1989); *Richardson-Vicks, Inc. v. The Upjohn Co.*, 122 F.3d 1476, 1484, 44 USPQ2d 1181, 1187 (Fed. Cir. 1997) (showing of unexpected results and commercial success of claimed ibuprofen and psuedoephedrine combination in single tablet form, while supported by substantial evidence, held not to overcome strong prima facie case of obviousness).

For the above reasons, it is believed that the rejections should be sustained.



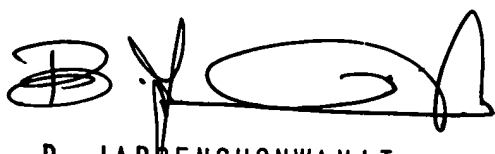
Art Unit: 2141

Respectfully submitted,

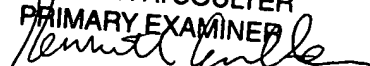
QN

June 23, 2003

Conferees



B. JARDENCHONWANIT  
PRIMARY EXAMINER

KENNETH R. COULTER  
PRIMARY EXAMINER  




RUPAL DHARIA  
PRIMARY EXAMINER

KNOBBE MARTENS OLSON & BEAR LLP  
2040 MAIN STREET  
FOURTEENTH FLOOR  
IRVINE, CA 92614